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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN ELLIS WALKER,

Defendant and Appellant.

C043679

(Sup.Ct. No. 02F08187)

A jury convicted defendant Kevin Ellis Walker of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and unlawful possession of a smoking device (Health & Saf. Code, § 11364), and defendant admitted a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12).

Following the denial of defendant's request that the trial court strike his prior conviction, the court sentenced defendant to state prison for 32 months, but suspended execution of the

sentence and placed defendant on probation pursuant to Proposition 36.

On appeal, defendant contends the trial court abused its discretion in denying his request to strike his prior conviction. We disagree.

The trial court has the power to dismiss a prior strike conviction. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) On appeal from the denial of a defendant's request to dismiss his prior strike conviction, the reviewing court will not disturb the trial court's ruling absent an affirmative showing of an abuse of discretion. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.)

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strike law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant's record at the time of his motion was as follows: June 1985, assault with a deadly weapon (Pen. Code, § 245, subd. (a)(2)), a felony, three years formal probation;

December 1987, grand theft (Pen. Code, § 487.1), a felony, three years formal probation; December 1991, theft (Pen. Code, § 484), a misdemeanor, two days county jail; February 1992, receiving stolen property (Pen. Code, § 496), a felony, five years probation; December 1993, welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2)), a misdemeanor, three years informal probation; July 1998, possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), a misdemeanor, failed diversion and further criminal proceedings were instituted; August 1999, driving without a valid license (Veh. Code, § 12500, subd. (a)), a misdemeanor, ordered to serve 15 days sheriff's work project; June 2002, possession of switchblade knife (Pen. Code, § 653k), a misdemeanor, three years informal probation, ordered to serve 15 days sheriff's work project; and the present offenses committed in September 2002 -- possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), and possession of paraphernalia (Health & Saf. Code, § 11364.)

Defendant argues the court abused its discretion in denying his request to strike his prior conviction because his only violent offense was 18 years earlier, his subsequent offenses were of decreasing seriousness, he has never been to state prison, he is remorseful and recognizes the adverse effect his methamphetamine use has had on his family, and he has plans for vocational training.

Defendant's record -- four felonies and six misdemeanor convictions occurring between 1985 and 2002 -- establishes that he has been consistently involved in crime all of his adult life

(defendant was 38 years old at the time of sentencing); numerous grants of probation have failed to alter his criminal ways; and he failed when placed on diversion. Not only does defendant's record demonstrate that he falls within the spirit of the Three Strikes law, but the denial of his request has the additional benefit of providing him incentive, namely, to avoid a 32-month sentence in state prison, to succeed under the probation provided him by Proposition 36. Consequently, there was no abuse of discretion by the trial court in denying defendant's request to strike his prior conviction.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.